Supreme Court, U.S.
FILED
DEC 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-432

In The

Supreme Court of the United States

October Term, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

vs.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA and DENNIS BATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

MARK D. STERN
KURT M. PRESSMAN
GOLDSTEIN, PRESSMAN, STERN & HILLER
Attorneys for Respondents
678 Massachusetts Avenue
Cambridge, Massachusetts 02139
(617) 492-2211

7816
LUTZ APPELLATE PRINTERS, INC.

TABLE OF CONTENTS

	Page
Opinions Below	2
Statement of the Case	2
A. Statement of Facts	2
B. Proceedings Below	3
Reasons for Denying the Writ:	
I. Introduction	7
II. The decision of the Court of Appeals that Title IV of the Act is not the exclusive remedy for and does not preempt Title I with regard to Title I pre-election violations is consistent with the language of the statute, the legislative history, and decisions of this Court and the various circuit courts.	8
A. The Express Language of the Act and its Legislative History Establish That Title IV Was Not Meant to Preempt Title I With Regard to Legitimate Title I Pre-Election Violations.	8
B. There Is No Conflict Between the Decision Below and the Decisions of This Court With Regard to the Jurisdiction of a District Court to Provide a Remedy For Legitimate Election-Related Violations of Title I of the LMRDA.	9

Contents

Page

C. The Decision of the Court of Appeals Below is Consistent with the Decisions of Other Circuit Courts with Regard to the Authority of a District Court to Fashion Appropriate Remedies for Election-Related Title I Violations..... 12

III. The scope of the preliminary injunction issued by the District Court was proper and not an abuse of its discretion, and does not raise a jurisdictional issue. 15

IV. There is no conflict between decisions of the courts of appeals as to whether an election is "already conducted" when all ballots may not have been received and no ballots have been counted. 17

V. The federal respondent's suggestion that the court below short-circuited the expeditious resolution of the instant case is without merit. 20

Conclusion 25

Exhibit A — Excerpts of Transcript of January 23, 1981 Hearing 26

Exhibit B — Excerpts of Transcript of February 20, 1981 Hearing 28

TABLE OF CITATIONS

Cases Cited:

Bunz v. Moving Picture Machine Operators Local 224, 567 F. 2d 1117 (D.C. Cir. 1977)..... 12

Contents

Page

Calhoon v. Harvey, 379 U.S. 134 (1964)....10, 12, 13, 14, 19

Colpo v. General Teamsters Local 326, 504 F. Supp. 573 (D. Del. 1980), aff'd, 659 F. 2d 399 (3d Cir. 1981) 13

Depew v. Edmiston, 386 F. 2d 710 (3d Cir. 1967)..... 12

Driscoll v. Operating Engineers Local 139, 484 F. 2d 682 (7th Cir. 1973), cert. denied, 415 U.S. 960 (1974) 13, 14

Finnegan v. Leu, ____ U.S. ____, 50 U.S.L.W. 4480 (U.S. May 17, 1982).....10, 11

Kapau v. Yamamoto, 622 F. 2d 449 (9th Cir. 1980)....12, 14

Keller v. Adams-Campbell Co., 264 U.S. 3314 (1924).... 7

Lawrence v. Utility Workers Union of America, 509 F. Supp. 1151 (N.D. Ohio 1981) 19

Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923)..... 7

Libutti v. DiBrizzi, 337 F. 2d 216 (2d Cir. 1964).....14, 19

McDonough v. Local 825 Operating Engineers, 470 F. 2d 261 (3d Cir. 1964) 18

McGuire v. Grand International Division of Bros. of Local Engineers, 426 F. 2d 504 (6th Cir. 1970) 19

McNeil v. Amalgamated Meat Cutters and Butcher Workmen of North America, 459 F. 2d 538 (8th Cir. 1977).... 12

Contents

Page

Meccano, Ltd. v. John Wanamaker, 253 U.S. 136 (1920) 15

Navarro v. Gannon, 385 F. 2d 512 (2d Cir. 1967), cert. denied, 390 U.S. 989 (1968) 11

Pignotti v. Local No. 3, Sheet Metal Workers International Association, 343 F. Supp. 236 (D. Neb. 1972), aff'd, 477 F. 2d 825 (8th Cir.), cert. denied, 414 U.S. 1067 (1973) 14

Prendergast v. N.Y. Telephone Co., 262 U.S. 43 (1923) 15

Robins v. Rarback, 325 F. 2d 929 (2d Cir. 1963), cert. denied, 379 U.S. 974 (1965) 13

Rolleson v. Hotel Employees' Local 879, 677 F. 2d 741 (9th Cir. 1982) 14

Sabolsky v. Budzanoski, 457 F. 2d 1245 (3d Cir. 1972) 13

Schonfeld v. Penza, 477 F. 2d 809 (2d Cir. 1973) 11, 12, 14

Stettner v. International Printing Pressmen, 278 F. Supp. 675 (E.D. Tenn. 1967) 14

U.S.W.A. v. Sadlowski, 50 U.S.L.W. 4626 (1982) 10, 11, 18

Contents

Page

Venet v. Local Union 606, United Brotherhood of Carpenters and Joiners of America, Virginia, Minnesota, 342 F. Supp. 819 (D. Minn. 1972) 13

Statutes Cited:

Labor-Management Reporting and Disclosure Act of 1959:

29 U.S.C. §411(a)(1) 3, 8, 15

29 U.S.C. §411(a)(2) 3, 15

29 U.S.C. §422(a)(5) 3

29 U.S.C. §412 8

29 U.S.C. §481(e) 4

29 U.S.C. §482 23

29 U.S.C. §483 .....6, 8

Rules Cited:

Supreme Court Rule 19 7

Supreme Court Rule 19(1)(b) 7

Other Authorities Cited:

"Union Elections and the LMRDA: Thirteen Years of Use and Abuse", 81 Yale Law Journal 407 (1972) ..21, 23, 24

Contents

Page

78 Harvard Law Review 1617 (1965) 23

13 Harvard Civil Rights—Civil Liberties Law Rev. 247 (1978) 23

No. 82-432

In The

Supreme Court of the United States

October Term, 1982

LOCAL NO. 82, FURNITURE AND PIANO MOVING, FURNITURE STORE DRIVERS, HELPERS, WAREHOUSEMEN, AND PACKERS; BART GRIFFITHS, SECRETARY-TREASURER, LOCAL NO. 82; GEORGE HARRIS, PRESIDENT, LOCAL NO. 82; PHILLIP PIEMONTESE, CHAIRMAN OF THE ELECTION COMMITTEE OF LOCAL NO. 82; and JOHN DOE, JAMES DOE and JEROME DOE, MEMBERS OF THE ELECTION COMMITTEE OF LOCAL NO. 82,

Petitioners,

vs.

JEROME CROWLEY, ANTHONY COYNE, JOSEPH FAHEY, ROBERT LUNNIN, JAMES HAYES, GERALD OWENS, JOHN LYNCH, JOSEPH TRASK, JOSEPH MONTAGNA, and DENNIS BATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents, Jerome Crowley, Anthony Coyne, Joseph Fahey, Robert Lunnin, James Hayes, Gerald Owens, John Lynch, Joseph Trask, Joseph Montagna, and Dennis Bates, respectfully oppose petitioners' petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts is officially reported at 521 F. Supp. 614, and is reprinted in Appendix A, pp. 1a-40a. The opinion of the United States Court of Appeals for the First Circuit has been reported at 679 F. 2d 978 and is reprinted in Appendix B, pp. 41a-93a.

STATEMENT OF THE CASE

A. Statement of Facts

The respondents adopt and incorporate herein the findings of facts of the District Court in this case (Appendix, pp. 17a-21a), and further add the following.

First, the District Court made reference to the "uproar among those [members] assembled outside the meeting" (Appendix, p. 18a) who claimed that the incumbents were imposing a new requirement for admission to the nominations meeting. In fact, as petitioners conceded at the District Court hearings on the preliminary injunction, in response to this new requirement all the members present other than the incumbent officers refused to enter the meeting room for nearly one hour. Finally, petitioner Griffiths asked the members in the hallway to send in a delegation, led by one of the respondents, to negotiate with the petitioners about this issue (*see* Court of Appeals decision, Appendix, p. 43a).

Second, the District Court found that, once the meeting began, Griffiths first read off a list of twelve "ineligible" candidates, which included four of the most vocal respondents (among them, James Hayes), and then Griffiths read off a list of sixteen "eligible" candidates, which included the three petitioners incumbent officers and a number of their supporters (Appendix, p. 20a). In fact, respondent James Hayes, whose name was read off as ineligible, was at trial conceded by Griffiths to have been eligible at the time.

A final important fact is that several days after the nominations meeting, respondent Lunnin received notice that Griffiths had filed disciplinary charges against him for his alleged "misconduct" during the nomination meeting. After a hearing before the Local 82 Executive Board, on which sat respondents Harris and Piemontese, Lunnin was fined $150 and prohibited from attending union meetings for two years. Lunnin appealed this decision within the union to Joint Council 10 of the Teamsters Union. No action was taken or hearing held on this appeal until January 15, 1981. At that time, after the hearings on the motion for preliminary injunction had ended and the petitioners had unilaterally agreed to run a new election, petitioners' counsel informed the court that the Joint Council had overturned this discipline (Appendix, p. 6a, note 6).

B. Proceedings Below

On December 1, 1980, respondents filed a complaint and motion for preliminary injunction against the petitioners in federal district court. The original complaint contained nine separate claims that the petitioners had violated the following rights of the respondents in violation of Sections 101(a)(1), (2), and (5) of Title I of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter "the Act" or "LMRDA"), 29 U.S.C. §411(a)(1), (2) and (5): their equal right to nominate candidates;

to attend and participate in the union's nomination meeting; to express their views freely about union business; and to be free from unlawful discipline. The complaint also contained a claim that one of the union's eligibility requirements was unreasonable and discriminatory, in violation of Title IV of the Act, 29 U.S.C. §481(e). These claimed violations occurred prior to, at, and subsequent to the November 9, 1980 nomination meeting.

On December 12, 1980, the District Court granted a temporary restraining order barring the petitioners from collecting or counting the ballots. The court conducted five days of evidentiary hearing on the motion for preliminary injunction, concluding on December 31st.

On January 9, 1981, prior to the issuance of any decision by the District Court on the evidence heard, the petitioners notified the court in writing that they had changed their position and were now prepared to hold a new nomination meeting and mail-ballot election. In this letter petitioners stated that this stipulation would substantially satisfy the respondents' request for preliminary injunction (with the exception of the respondents' challenge under Title IV to the above-noted eligibility requirement).

The petitioners at several times reiterated that they considered these unilateral stipulations binding upon them and were not mere offers of settlement (Appendix, p. 4a, note 4). On January 15 and 22, 1981 the petitioners filed further binding stipulations setting forth the procedures by which they would conduct the new nominations meeting and election, subject to the District Court's approval.

On January 31, 1981 respondents filed a motion to amend their complaint to conform to the evidence presented. This motion was granted and a hearing was held on March 6, 1981 to allow both sides to present any other evidence they desired.

During the months of January, February, March, and April, there were a number of hearings which dealt with the petitioners' stipulations to run a new election, respondents' objections to certain matters not being included in the new election process, and the efforts of both parties to refine the details of the new election by agreement. At a hearing on January 23, 1981 the petitioners further stipulated that none of the officials of petitioner Local 82 would have anything to do with the supervision of the election, which they had proposed to be run by Joint Council 10, an intermediate body of the teamsters union comprised of members of local teamsters unions in the New England area.

On February 12, 1981, the court issued a proposed order for the conduct of a new election. This proposed order was virtually identical to the stipulations filed by the petitioners, with the exception that the party conducting the election would have to file an undertaking with the court agreeing to conduct the election in accordance with the terms of the order. The proposed order also contained a provision enjoining the individual petitioners from violating Title I of the Act, and a requirement that the notice of the new election process be sent to union members containing a statement referring to the court proceedings. Subsequently, on February 20, 1981, petitioners informed the court that Joint Council 10 was *not willing* to conduct the election if it were to be supervised by the District Court (Appendix, p. 38a).

The District Court requested that the parties suggest and attempt to agree upon a third party to supervise the election. The petitioners made no suggestions regarding such a third party. The respondents, after substantial inquiry, proposed a third party (the third party ultimately appointed as arbitrator by the court), and the petitioners stated that they had no objection to this third party.

On July 13, 1981, the District Court issued its preliminary injunction and memorandum. The preliminary injunction is

identical to its February 12, 1981 proposed order, with the exception of the designation of the outside arbitrator and certain provisions necessitated by the fact that a non-union third party would supervise the election process. None of these modifications substantially changed the order proposed on February 12, 1981.

In its memorandum accompanying its preliminary injunction, the District Court concluded that it had jurisdiction over respondents' claims of discrimination and free speech under Title I of the Act, but that it lacked jurisdiction over their Title IV claim regarding the reasonableness of the challenged eligibility requirement (Appendix, p. 13a). The court went on to find that both before and during the November 9, 1980 nominations meeting, petitioners Griffiths and Harris deliberately attempted to deny the respondents the rights under Title I to nominate candidates, to attend membership meetings, to participate in the deliberations of such meetings, to meet and assemble freely with other members, and to express their views openly (Appendix, p. 21a).

The First Circuit Court of Appeals affirmed the District Court's decision. After an extensive review of the legislative history that led to the adoption of the Act, that court found this history "does not suggest that Congress sought to oust the federal courts of jurisdiction over [Title I] complaints involving union elections. . . . [T]here is no evidence that limitations on Title I by Title IV were ever contemplated" (Appendix B, pp. 58a-59a). The court further concluded that the respondents had alleged legitimate Title I claims in their complaint (Appendix, p. 60a), and that an election is not "already conducted" for purposes of Section 403 of Title IV, 29 U.S.C. §483 until all the ballots are counted.

As to the petitioners' attack upon the scope of the District Court's preliminary injunction, the Court of Appeals concluded

that the District Court had constructed an order that was as close as possible to the petitioners' stipulations, and that the two specific provisions to which the petitioners objected did not in any way impair the status quo (Appendix, p. 74a).

REASONS FOR DENYING THE WRIT

I.

INTRODUCTION

A petition for certiorari must meet the criteria set forth in Supreme Court Rule 19. In the instant case petitioners and the federal respondent Secretary of Labor contend both that the Court of Appeals (1) "has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; [and (2)] has decided a federal question in a way in conflict with applicable decisions of this Court." Supreme Court Rule 19(1)(b).

It is well established that conflict under Rule 19 must be demonstrated to be "square and unreconcilable" and not merely an inconsistency in dicta or in the general principles utilized.[1] No such conflict as to any aspect of the lower court's decision herein has been demonstrated by either petitioners or the federal respondent.

---

1. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-3 (1923); *Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924); *Wisc. Electric Co. v. Dunmore Co.*, 282 U.S. 813 (1931); *see also*, former Rule 38(5)(b) from which the word "probably" was deleted in adopting Rule 19(1)(b).

II.

THE DECISION OF THE COURT OF APPEALS THAT TITLE IV OF THE ACT IS NOT THE EXCLUSIVE REMEDY FOR AND DOES NOT PREEMPT TITLE I WITH REGARD TO TITLE I PRE-ELECTION VIOLATIONS IS CONSISTENT WITH THE LANGUAGE OF THE STATUTE, THE LEGISLATIVE HISTORY, AND DECISIONS OF THIS COURT AND THE VARIOUS CIRCUIT COURTS.

A. The Express Language of the Act and its Legislative History Establish That Title IV Was Not Meant to Preempt Title I With Regard to Legitimate Title I Pre-Election Violations.

It is the initial contention of both the petitioners and the Secretary of Labor that Title IV of the LMRDA is the exclusive remedy for any and all election-related complaints of union members, even for complaints that allege legitimate Title I violations, regardless when such violations occur. The language of the Act, however, does not so provide.

Title I of the LMRDA, the so-called union members' "Bill of Rights", expressly guarantees, in part, union members' equal rights and privileges to nominate candidates for union office, to vote in union elections, and to attend union meetings, subject to reasonable rules and regulations, 29 U.S.C. §411(a)(1). Title I also explicitly provides that federal district courts have jurisdiction to remedy violations of Title I, including issuing injunctions. 29 U.S.C. §412. Nothing in Title I limits a district court's jurisdiction to remedy Title I violations involving discrimination in the right to nominate candidates, vote and attend nominations meetings.

Title IV of the Act also deals extensively with union elections. While 29 U.S.C. §483 states that "[t]he remedy provided by this

subchapter for challenging an election *already conducted* shall be exclusive" (emphasis added), nothing in that provision or anywhere else in the Act states that Title IV is the exclusive remedy for *pre-election* violations.

The legislative history of the Act likewise does not support such a contention. The Court of Appeals in its decision carefully and at length analyzed and recounted the legislative history that led to the enactment of the Act (Appendix, pp. 53a-59a); such an analysis need not be repeated here. Respondents would, however, emphasize the Court of Appeals' conclusion:

> This history suggests that Congress intended the Secretary to have considerable responsibility for examining union elections, but it does not suggest that Congress sought to oust the federal courts of jurisdiction over complaints involving union elections. The exclusiveness of the Title IV remedy in certain cases was intended to exist only vis-a-vis state remedies; there is no evidence that limitations on Title I by Title IV were ever contemplated (Appendix, pp. 58a-59a).

B. There Is No Conflict Between the Decision Below and the Decisions of This Court With Regard to the Jurisdiction of a District Court to Provide a Remedy For Legitimate Election-Related Violations of Title I of the LMRDA.

Petitioners have failed to cite a single decision of this Court or any court of appeals wherein an election-related violation of Title I was found, and despite that, it was held that the court lacked jurisdiction or statutory authority to enjoin and supervise the conduct of a rerun election. Despite an assertion to the contrary, neither has the federal respondent (Federal Respondent's Brief at pp. 9-10).

Petitioners rely on the case of *Calhoon v. Harvey*, 379 U.S. 134 (1964) and two recent decisions of this Court[2] for the proposition that the decision of the First Circuit Court of Appeals herein is "at odds with" the decisions of this Court. However, this Court based its decision in *Calhoon* on its determination that no legitimate Title I violation was found to have occurred therein. The Court in *Calhoon* ruled that "the equal-rights language of §101(a)(1) would have to be stretched far beyond its normal meaning to hold that" it applied to the facts of that case. 379 U.S. at 138.

The two most recent pronouncements of this Court upon which petitioners rely — *U.S.W.A. v. Sadlowski*, 50 U.S.L.W. 4626 (1982) and *Finnegan v. Leu*, 50 U.S.L.W. 4480 (1982) — serve the union member respondents' assertions far better than they do petitioners.

In *Sadlowski, supra*, this Court reaffirmed its prior recognition that the provisions of Title I apply to the conduct of union elections and not simply to the exercise of rights unprotected under Title IV of the Act. 50 U.S.L.W. at 4629 and at 4632. As Justice White stated in the minority opinion:

> What Congress then did was to guarantee the union member's right to run for election, §401(e), and to guarantee him freedom of speech and assembly. §101(a)(2). *There is no question, and the Court concedes as much, that the Act created statutory protection for the union member's right effectively to run for union office. Without doubt,* §101(a)(2) was not only aimed at protecting the member who speaks his mind on union affairs, even if critical

---

2. The federal respondent relies only on the *Calhoon* decision.

> of the leadership, but *was also "specifically designed to protect the union member's right to seek higher office within the union." Hall v. Cole,* 412 U.S. 1, 14 (1973).

(Emphasis added.) 50 U.S.L.W. at 4632.

Petitioners point, however, to the fact that the Court majority in *Sadlowski* notes, as often this Court has, that Congress intended to impose through Title IV only "minimum standards" after which unions are free to run their own elections. 50 U.S.L.W. at 4630. Petitioners, citing several other decisions of this Court in which this general principle has also been enunciated, construe this principle to be a rigid mandate that a district court may never fashion a remedy that impinges upon an internal union election, even if clear Title I violations are found to have occurred (Petition, p. 14).

However, the *Sadlowski* decision and the language of Title I show that the members of the Court do not concur in such a rigid view. For, as noted in Justice White's dissent, despite recognizing that Title IV of the Act addressed the subject matter of "contributions" to candidates for union office, the entire *Sadlowski* Court agreed that Title I rights applied to procedures governing the election of union officers. 50 U.S.L.W. at 4632.

In *Finnegan, supra,* also, and in this Court's denial of certiorari in *Navarro v. Gannon,* 385 F. 2d 512 (2nd Cir. 1967), *cert. denied,* 390 U.S. 989 (1968), this Court implicitly recognized the authority of a district court, on a union member's complaint, to enjoin an election proceeding where both Title I and Title IV rights have been abridged as "part of a purposeful and deliberate attempt by union officials to suppress dissent within the union." *Finnegan,* 50 U.S.L.W. at 4482 [quoting from *Schonfeld v. Penza,* 477 F. 2d 899 (2nd Cir. 1973)]. The decision in *Finnegan* does

not, in referring to *Schonfeld,* suggest any disagreement with the distinction drawn therein between *Calhoon* and cases, like the instant one, which the District Court below found to concern "discrimination and free speech claims that defendants applied [a] . . . rule in a discriminatory fashion in retaliation for plaintiffs' exercise of their right to speak freely." (Appendix, p. 13a).

C. The Decision of the Court of Appeals Below is Consistent with the Decisions of Other Circuit Courts with Regard to the Authority of a District Court to Fashion Appropriate Remedies for Election-Related Title I Violations.

The First Circuit Court of Appeals, in upholding the jurisdiction of the District Court in this case to enjoin the union election and to order that a new election be conducted under its supervision, relied upon five decisions from other courts of appeal which came to the same conclusion.[3]

Despite these circuit court decisions the petitioners contend:

> The courts have consistently respected the Secretary of Labor's authority where the remedy requested would have required the district court to supervise the details of the union election (citations omitted) (Petition, at p. 16).

---

3. *Schonfeld v. Penza, supra; Kupau v. Yamamoto,* 622 F. 2d 449 (9th Cir. 1980); *McNeil v. Amalgamated Meat Cutters and Butcher Workmen of North America,* 459 F. 2d 538, 540-51 (8th Cir. 1977); *Depew v. Edmiston,* 386 F. 2d 710 (3rd Cir. 1967). *See also, Bunz v. Moving Picture Machine Operators, Local 224,* 567 F. 2d 1117, 1120-24 (D.C. Cir. 1977).

In fact, neither of the two cases they cite for this proposition dealt with Title I violations.[4] In *Robins v. Rarback*, 325 F. 2d 929 (2nd Cir. 1963), *cert. denied*, 379 U.S. 974 (1965) the court relied on its having found that "the plaintiff has not been denied the right to vote and makes no claim based on any such denial." 325 F. 2d at 930. What it stated thereafter was dictum only, as the lengthy concurrence notes. 325 F. 2d at 931-4.

Furthermore, as noted in *Bunz v. Moving Picture Machine Operators*, 567 F. 2d 1117 (D.C. Cir. 1977), the Second Circuit Court of Appeals has three times subsequent to its decision in *Robins, supra*, not consistently followed the "narrow approach to the 'equal right to vote' " pronounced in dictum therein. The Third Circuit has likewise rejected that approach altogether. *Sabolsky v. Budzanoski*, 457 F. 2d 1245, 1251 (3rd Cir. 1972).

In *Driscoll v. Operating Engineers Local 139*, 484 F. 2d 682 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) the court also found, contrary to the federal respondent's assertion, that no violation of Title I had been alleged.[5] 484 F. 2d at 689.

---

4. Likewise, no Title I violations were found in *Colpo v. General Teamsters Local 326*, 5[illegible]0 F. Supp. 573 (D. Del. 1980), cited by petitioners, and *Venet v. Local Union 606, United Brotherhood of Carpenters and Joiners of America, Virginia, Minnesota*, 342 F. Supp. 819 (D. Minn. 1972), cited by federal respondent. Indeed *Venet, supra*, is totally inapposite, since the court therein found no pre-election violations of any kind, Title I or IV.

5. It should also be noted that the complaint in *Driscoll, supra*, concerned an alleged violation in an election that had concluded four years prior to the District Court's dismissal of plaintiffs' suit. 484 F. 2d at 684 and 688, footnote 11.

The court therein noted:

> Thus, *Calhoon* requires analysis of the substance (379 U.S. at 138, 85 S. Ct. 202) and basic nature (*Id.* at 141, 85 S. Ct.

(Cont'd)

In fact, as the Ninth Circuit Court of Appeals held in *Kapau v. Yamamoto, supra,* where a violation of Title I has been found, the courts have not consistently deferred to the Secretary of Labor, but rather have exercised jurisdiction over the claim. 622 F. 2d at 455[6]. The court noted:

> In each of these cases the Court upheld relief under Title I despite the fact that the plaintiffs could have sought some relief pursuant to Title IV.
>
> We believe that the better view of the relationship between Title I and Title IV remedies is that espoused in *Depew v. Edmiston,* 386 F. 2d 710 (3rd Cir. 1967), where the court held that *the crucial inquiry is whether a union member has been discriminated against in the exercise of his Title I rights. If so, then "regardless of other claims" his Title I cause of action is not preempted* by the existence of Title IV claims.

622 F. 2d at 455. (Emphasis added.)

(Cont'd)

> 292) of the complaint in order to determine whether jurisdiction exists. Such an approach was employed in *Schonfeld v. Penza,* 477 F. 2d 809 (2nd Cir. 1973).

484 F. 2d at 687, at footnote 6.

6. *See also, Bunz, supra; Pignotti v. Local No. 3 Sheet Metal Workers International Association,* 343 F. Supp. 236 (D. Neb. 1972), *aff'd,* 477 F. 2d 825 (8th Cir.), *cert. denied,* 414 U.S. 1067 (1973); *Stettner v. International Printing Pressmen,* 278 F. Supp. 675 (E.D. Tenn. 1967); *Rolleson v. Hotel Employees, Local 879,* 677 F. 2d 741 (9th Cir. 1982) and *Libutti v. DiBrizzi,* 337 F. 2d 216 (2nd Cir. 1964).

III.

THE SCOPE OF THE PRELIMINARY INJUNCTION ISSUED BY THE DISTRICT COURT WAS PROPER AND NOT AN ABUSE OF ITS DISCRETION, AND DOES NOT RAISE A JURISDICTIONAL ISSUE.

In their "Questions Presented for Review" and in their argument, the petitioners focus, as the fundamental issue, on the fact that the District Court ordered the union to conduct an election of officers under the supervision of third parties not associated with the union, utilizing rules and procedures prescribed by the District Court (Petition, pp. i, 9-10).

To the extent that the petitioners are attacking the scope and terms of the preliminary injunction, this case raises no new or difficult issues of law and does not merit review by this Court. It is well-established that the scope of interlocutory review of an order granting or denying a preliminary injunction is narrow and that such an order will not be disturbed unless clearly erroneous or an abuse of judicial discretion. *Meccano, Ltd. v. John Wanamaker*, 253 U.S. 136 (1920); *Prendergast v. N.Y. Telephone Co.*, 262 U.S. 43, 50-51 (1923).

The District Court in this case found that the petitioner union officers had deliberately attempted to deny the respondents their rights under 29 U.S.C. §411(a)(1) and (2) (Appendix, p. 21a). For the District Court in such circumstances to then require that the election be conducted under the court's monitoring and supervision was not clearly erroneous or an abuse of discretion.

Moreover, petitioners' contention is totally disingenuous and particularly groundless in light of the fact that the petitioners had

unconditionally stipulated', prior to the District Court rendering any decision, that the first election was void, that a new election should be held, and that none of the petitioner officers of Local No. 82 would have any role in the conducting of the new election (*see* Exhibit A, appended hereto, Transcript of January 23, 1981 Hearing, pp. 530-531). The petitioners subsequently informed the court that, contrary to their earlier representations and expressed desires, Teamsters Joint Council 10 would not agree to conduct the new election under order of the court, because it did not want to be "possibly liable to a contempt proceeding" in the event that the election was "run amiss for some reason or other" (Exhibit B, appended hereto, Transcript of February 20, 1981 Hearing, pp. 536-538).

At no time did the District Court ever rule that either the petitioner Local No. 82 or Teamsters Joint Council 10 were barred from conducting the election. Indeed, until Joint Council 10 refused to conduct the election, the District Court appeared to favor Joint Council 10 running the new election (Exhibit B, p. 537, lines 6-10). Only after that union body refused to supervise the election did the court request that the parties agree upon an acceptable third party.

As to petitioners' objections to the content of the District Court's order — that the court ordered a new election "in a different form or manner than is required by [the union's] own constitution or bylaws," — the Court of Appeals correctly noted that the District Court "constructed a preliminary injunction that effected as little change as possible from terms which defendants found acceptable," and that the two paragraphs to which the

---

7. The petitioners initially expressed their position as an *unconditional* stipulation, not an offer of settlement, and later expressly reiterated that position (Appendix, p. 4a).

defendants objected had nothing to do with maintaining the status quo (Petition, p. 9; Appendix, p. 74a).

Furthermore, the federal respondent's citations of law on this point do not stand for the propositions he asserts in his brief (Federal Respondent's Brief, at pp. 11-12).

IV.

THERE IS NO CONFLICT BETWEEN DECISIONS OF THE COURTS OF APPEALS AS TO WHETHER AN ELECTION IS "ALREADY CONDUCTED" WHEN ALL BALLOTS MAY NOT HAVE BEEN RECEIVED AND NO BALLOTS HAVE BEEN COUNTED.

The petitioners argue that there is a conflict between the decision of the appeals court in this case, and the decisions of the Second, Third and Sixth Circuits, as well as decisions of three district courts[8]. A review of these decisions reveals no such conflict among their holdings.

In the instant case, the Court of Appeals held that an election was not "already conducted" until completed. The appeals court found:

> On December 12th, in order to preserve the status quo and to protect its own jurisdiction, the district court issued a temporary restraining order preventing the Local from counting (and even picking up) the ballots, *some of which had already*

---

8. The federal respondent relies only on the decisions of the Third and Sixth Circuits and relies on a different, fourth decision of a district court.

> *been received* (Appendix, p. 46a). (Emphasis and parenthetical amplification added.)

The court below drew the line for a "completed" election as the time "the ballots have been counted" (Appendix, p. 67a). The court in essence decided first that "conducted" did not mean merely "commenced", but "completed", and then determined at what point an election is "completed"[9].

In *McDonough v. Local 825 Operating Engineers*, 470 F. 2d 261 (3rd Cir. 1964), the court found that "balloting has been completed" where all the ballots had been cast and counted, though not yet certified. It held:

> It is a reasonable interpretation of sec. 483 to hold that an election had been conducted once balloting has occurred. Cf. *Libutti v. DiBrizzi*, 337 F. 2d 216 (2nd Cir. 1964). This comports with a literal reading of "conducted" as well as with a reading that adheres to Congressional policy.

---

9. As to the first part of its two-part determination — that "conducted" does not mean merely "commenced" — neither the petitioners nor the federal respondent contend that the court either erred or, in so ruling, conflicted with any other circuit court's decisions. Nor reasonably speaking, could they have so argued consistent with the principles recognized in *Sadlowski, supra*, and the self-evident intent of Congress in making Title I safeguards applicable to elections and enforceable through §102. For if "conducted" were synonymous with "commenced", and Title IV, the sole remedy for elections commenced, then the protections of Title I applicable to union elections could never be enforced under §102.

Notwithstanding both petitioners' and the federal respondent's contentions to the contrary, the cases cited by them are not truly in conflict with the instant one.

> To say, as the district court did, that the election is not completed until the result is certified would set up a race to the court house since it is difficult to believe that any complaining party would choose to wait until a result had been finalized to bring suit because he would then have to use secs. 481-483. Cf. *McGuire v. Grand International Division of Bros. of Local Engineers,* 426 F. 2d 504, 508 (6th Cir. 1970). 470 F. 2d at 264.

The respondents do not believe the court in the above-quoted statement equated "conducted" with "begun"; if, however, it did, its statement to that effect would be dicta and dicta only.

The *McDonough* court's reference to *Libutti v. DiBrizzi,* 337 F. 2d 216 (2nd Cir. 1964) may have confounded petitioners who assert: "The Second Circuit has found Title IV jurisdiction to extend over practices occurring 'subsequent to the nomination and voting' " (citations omitted) (Petition, at p. 18). While it may be the case that after an election has been completed, the Secretary has Title IV jurisdiction to investigate violations that occurred at *any* point in the election process, that neither is the issue at hand, nor was it the issue in *Libutti, supra.* Indeed, the Second Circuit found therein that Title I had been violated by the union's disqualification of candidates nominated for office, and affirmed the District Court's issuance of an order enjoining an election's going any further without correcting such violation.

Also, contrary to petitioners' contentions, *Lawrence v. Utility Workers Union of America,* 509 F. Supp. 1151 (N.D. Ohio 1981) and *McGuire v. Grand International Division of Bros. of Local Engineers,* 426 F. 2d 504 (6th Cir. 1970) dealt solely with complaints filed long after the votes had been tabulated. In both cases, the courts determined that the allegations of Title I violations therein were, as in *Calhoon,* merely attempts to dress Title IV

violations in Title I clothing. As such, neither holding conflicts with the holding in the instant case.

V.

THE FEDERAL RESPONDENT'S SUGGESTION THAT THE COURT BELOW SHORT-CIRCUITED THE EXPEDITIOUS RESOLUTION OF THE INSTANT CASE IS WITHOUT MERIT.

The federal respondent asserts that by the action of the court below:

> The Secretary's expertise in the conduct of elections is then entirely cast aside. *The delay that can result* is typified by the sequence in this case: the election nullified on December 12, 1980 was not rerun until exactly *one year* later (Pet. 18 n.39). A hearing to review the conduct of the nominations meeting, undertaken by Teamsters Joint Council 10, was cancelled when this action was filed (Pet. App. 15a-16a). Review of respondents' claims and the possibility of extra-judicial *resolution by the Secretary was short-circuited.* (emphasis added) (Federal Respondent's Brief, at p. 12).

The first of these suggestions regarding Joint Council 10 strains credulity. The only entity that prevented the Joint Council or the Secretary from reviewing the electoral process was the petitioner union by stipulating to rerun the election *before* either addressed the matter. The Joint Council took action to vacate the discipline of respondent Lunnin a full month after the court issued its restraining order impounding the election ballots; it could have vacated the electoral process as well, had it so desired. Instead, Joint Council 10 on its own initiative cancelled the hearing

scheduled for respondent's protest of the election (Appendix, p. 15a).

Likewise, if as contended herein the federal respondent believed the election was completed as of December 12, 1980, the Department of Labor could have taken action to correct the electoral abuses and schedule a Department-supervised rerun election any time prior to July 13, 1981. That he did not belies the federal respondent's assertion that the Court interfered with his speedily remedying the situation in the petitioner Local 82. The fact is that the Secretary never believed this election had transpired until he filed a motion to intervene just prior to this case's being argued before the Court of Appeals.

The suggestion that the one year the process below took in total was a delay that would have been avoided had this case followed the Title IV route is nothing short of disingenuous. According to the 1969 statistics published in Appendix D to one of the very law review articles upon which the federal respondent relies, the Secretary's average time for settled cases was 2 years, 1.6 months, and for court-decided cases 2 years, 6.7 months. *Note: Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 Yale L.J. 407 (1972), at p. 573.

Since, as the federal respondent states, elections are required to be conducted at least triennially, the one year lapse herein contrasts most favorably with the several years delay involved in cases handled by the Secretary. The contrast between these time-lapses proves, where a union election is conducted with no regard for the Title I rights of union members and remedied after the fact by the Secretary, the wrong-doers remain in office on average for between 71% and 84% of the term for which they were never lawfully elected; where Title I rights are vindicated by pre-election relief granted by the courts, union members live under the jurisdiction of lawfully elected officials for the entirety

of the following term of office.[10] There is no more compelling argument for pre-election, court-ordered relief under Title I than this! Hence the aforementioned comment notes:

> Most significantly, it is argued that the remedy comes too late in the Title IV enforcement process. The average time between the contested election and the completion of the rerun, assuming no appeal beyond the district court, is two years and seven months. As would be expected, complainant attorneys unanimously indicated that *litigation under Title IV was ineffective due to this delay.* But a substantial portion of union attorneys concurred, and even more significantly, DOL filed staff members also considered the enforcement mechanism ineffective because of the substantial delays. *Delay undoubtedly works to the advantage of the incumbent.* If a rerun were held promptly after the contested election, the abridgement of democratic procedures might itself become an issue in the subsequent election. But the passage of time and the low profile of DOL supervision make it unlikely that the rerun campaign will focus on this issue. Rather, the incumbent's performance during his time in office will be the more likely subject of debate. If the incumbent has performed well, the membership may re-elect him even though his incumbency is the fruit of unlawful conduct in the original election.

---

10. The previously lawfully elected officials remain in office for the first year and subsequently lawfully elected ones for the remainder of the term.

> *Delay robs the rerun device of both remedial and deterrent objectives.* . . . The deterrence aspect of the rerun device is further impaired by the approach employed by the Department in supervising the election, which generally fails to take account of the widespread ignorance of the provisions of the Act among the rank and file and their willingness to tolerate less than fair procedures. . . .
>
> *The inadequacy of the rerun device is shown most clearly in its utter failure as a means of disciplining conscious attempts to subvert democratic procedures to gain office.* When such tactics succeed, the unscrupulous candidate will nevertheless spend an average of over two and one half years in office. While he may hold that office under an aura of illegitimacy, he will nevertheless have at his disposal the union's communications resources and the opportunity to justify his incumbency by performance. The losing candidate, particularly if he is part of a wider insurgent movement, faces the gradual fragmentation of his support and possible harassment and intimidation of himself and his supporters (emphasis added).[11]

To further suggest as federal respondents do, that the "enforcement scheme set out in Section 402 (29 U.S.C. §482) could have been immediately implemented "had the district court not intervened" belies the fact that that "immediate"

---

11. 81 Yale Law Journal, at 523-526. *See also*, 78 Harvard Law Rev. 1617, at 1633-34 (1965); and 13 Harvard Civil Rights — Civil Liberties Law Rev. 247 at 299 (1978).

implementation would not have begun for at least three months thereafter and would on the average take more than two years thereafter to resolve, and longer if appealed (Federal Respondent's Brief, p. 12).

To raise additionally the spectre of 53,000 lawsuits every three years, as federal respondents do, without noting that as of the end of 1969 the Secretary had only brought 177 in the first ten years of the Act's operation is equally disingenuous [Appendix B to 81 Yale Law Journal 407, 572 (1972)].

Finally, the Secretary inaccurately asserts that the delay in this case is "typical" of what would occur in future cases. A substantial reason for the lapse of time between the petitioners' stipulation to run a new election in January, 1980, and the District Court's preliminary injunction in July, 1980, was related in part to respondents' injection of a new claim regarding the validity of prior dues collected by the petitioners and in part by the search for a third party to supervise the election, after Joint Council 10 refused to supervise it under the terms of the court's order.

CONCLUSION

For the above reasons and the additional reason that this action will be wholly moot before this Court is likely to decide the merits of the instant petition[12], the petition should be denied.

Respectfully submitted,

MARK D. STERN
KURT M. PRESSMAN

GOLDSTEIN, PRESSMAN,
STERN & HILLER
Attorneys for Respondents

12. The next regularly scheduled election in the petitioner Local Union must be held in the fall of 1983.

EXHIBIT A — EXCERPTS OF TRANSCRIPT OF JANUARY 23, 1981 HEARING

[Commencing at page 530]

* * *

should be reminded that the original complaint asks no more than that the local union conduct an election. Now the local union is willing to bring in a third party, an outside party. Obviously if a member of the local union executive board is also a representative of Joint Council 10 that local union representative will not be assigned by the joint council to have any responsibility for conducting the election. The Teamster constitution reflects the requirements of due process that are set forth in the statute.

THE COURT: Well, in that respect I think it would be helpful if that is a part of the understanding with which you make the proposal that that be made clear in the stipulation so that —

MR. WITLEN: Defendants so stipulate, your Honor. It is so fundamental as to defy description. We are not attempting to defraud this Court by having the same people conduct an election by putting on a different hat and saying sorry, I am no longer Bart Griffith, Local Union 82 officer, I am now Joint Council 10 representative. But we will stipulate that none of the officials of Local 82 will have anything to do with the supervision provided by Joint Council [531] 10. The Teamster constitution provides in several places that members involved in charges or internal hearings cannot serve on trial panels. The statute requires such prohibitions. The cases which deal with the enforcement of the statute under Section 101(a)(5) are clear that merely by having one of the officers involved in a proceeding does not disqualify everyone else in the local union from participating in an internal union proceeding. This statute was designed to foster democratic

procedures within the union and if every time a dispute arises within the union a Court takes it away from the union then those democratic procedures are never going to develop and a legion of cases can be cited for that proposition.

• • •

EXHIBIT B — EXCERPTS OF TRANSCRIPT OF FEBRUARY 20, 1981 HEARING

[Commencing at page 536]

MR. WITLEN: Your Honor, I don't know whether you want to skip ahead to paragraph 9 but I should advise the Court that not only does the general president have problems complying with that but also Joint Council 10 has problems.

THE COURT: I think it may be well for us then to go forward to that issue and address it.

Now by reason of the fact that I am proposing to order some conditions beyond those that were included in the stipulation it seems to me I must have some undertaking from any third party who is to conduct this election that it will be conducted in accordance with this order. Otherwise there is too much risk that we have very extensive future controversy about enforcement of the Court's order with possibilities of not one additional election but more if there were problems about it. It seems to me I must have an undertaking from anyone who is going to conduct the election that it be done in conformity with the Court's order. If it were being done by a party we would have it in effect by the appearance before the Court and the parties being bound by the Court's order. If we are having a third party do it, not a party to the litigation, that party [537] must be subject to the order of this Court to do it in accordance with the order of the Court and it seems to me the only way to accomplish that or at least the best way to accomplish it is by a formal undertaking by that party.

Now if Joint Council 10 is not willing to do that then it seems to me I have to hear the parties on what other arrangements to make and order some third party who is willing to make that

undertaking to conduct the election.

Now I recognize that Joint Council 10 is not a party and therefore counsel are not in a position to speak for Joint Council 10 but if you tell me that Joint Council 10 appears not to be willing to make this undertaking then I think I must proceed to hear you promptly on what alternative arrangements the Court should consider for supervision of the election.

MR. WITLEN: Although I do not represent Joint Council 10, I am prepared to tell the Court that Joint Council is not willing to undertake the responsibility or sign any document which might render it possibly liable to a contempt proceeding in this Court or any other type of proceeding in the event the election is run amiss for some [538] reason or another.

THE COURT: Then isn't it clear I must order somebody else to conduct the election who is willing to undertake to do it in accordance with the Court's order?

MR. WITLEN: We understand your position, your Honor, and unfortunately that's the Joint Council's position.

THE COURT: All right. Now how do you wish to address this question? It obviously is going to result in some further delay in holding the election but I think it must be resolved.

MR. STERN: I don't think it will result in any delay, your Honor. We expect to hear Monday from the American Arbitration Association as to their willingness — the local entity has indicated a willingness to deal with this matter. They are just checking it through I think their Washington or New York headquarters for review. Where they indicated the local's willingness that they would have a response by Monday, they were talking about this Court's timetable, not a delayed timetable. So it is very possible as of Monday we will know there is an entity prepared to undertake this.